Supreme Court, U.S.
FILED
MAY 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1567

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUN PIPE LINE CO., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner argues that the courts below should have treated its motion for reconsideration as a motion to amend the complaint under Fed. R. Civ. P. 15.

1. In November 1982 a substantial quantity of petroleum leaked from a pipeline near Newton, Pennsylvania, that is owned and operated by petitioner. In April 1983 the Pennsylvania Department of Health asked Dr. Thomas Spittler, an employee of the Environmental Protection Agency (EPA), to monitor the quality of the air in the vicinity of the spill. He did so and reported his findings to state officials. Nearby homeowners subsequently brought suit against petitioner in state court, alleging property damage and adverse health effects as a consequence of the leak. Petitioner was found negligent after a trial, and the state court then scheduled a second trial to set damages. At that point, petitioner asked the state court plaintiffs to stipulate to the accuracy of Spittler's findings. The plaintiffs refused. Pet. App. A2.

Petitioner then sought to take Spittler's deposition. The Pennsylvania state court authorized the taking of the deposition, but never issued a subpoena. Petitioner nevertheless noticed the deposition and brought suit in the United States District Court for the District of Massachusetts, seeking an order requiring EPA to produce Spittler (who was based in Boston) to be deposed. Pet. App. A3. While the suit was pending, EPA refused to produce Spittler; the agency cited 40 C.F.R. 2.403, which authorizes EPA to grant requests for voluntary testimony by agency employees when doing so "would clearly be in the interests of EPA" (Pet. App. A34). The district court subsequently ruled against petitioner, holding that it lacked the authority to compel a federal employee, acting in his official capacity, to appear in state court (see *id.* at A3). Petitioner then filed a motion for reconsideration, arguing for the first time that EPA's refusal to authorize Spittler's testimony was arbitrary and capricious. The district court denied this motion (*id.* at A52).

The court of appeals affirmed, rejecting petitioner's argument that EPA's decision should be set aside under the Administrative Procedure Act (APA) (Pet. App. A1-A8). The court explained that petitioner's suit originally had sought relief in the form of mandamus, to which petitioner now conceded it was not entitled (*id.* at A4). The dispositive question on appeal, the court continued, was whether the district court acted properly in denying petitioner's motion for reconsideration – a motion that did not cite any particular provision of the Federal Rules of Civil Procedure, but which the court concluded should be treated as a motion under Fed. R. Civ. P. 59(e) (Pet. App. A4-A5). The court accordingly concluded that "the scope of [its] review extends only to the appropriateness of that denial – not to the fundamental correctness of the underlying judgment" (*id.* at A5). The court added that it "will

not overturn the trial court's decision on such a matter unless the appellant can persuade us that the refusal to grant the motion was a manifest abuse of discretion" (*ibid.*).

Here, the court held that, "[w]hatever view may be taken of the underlying merits of the case, the abuse-of-discretion argument simply will not wash" (Pet. App. A5). Even if petitioner is correct in asserting that EPA personnel decisions are subject to judicial review, the court explained, petitioner's "request for Dr. Spittler's testimony did not conform to [EPA] regulations, the complaint which [petitioner] filed in this action contained no charge of arbitrariness, and the motion to reconsider—though it contained such a charge—offered precious little to substantiate it" (*id.* at A6 (footnote omitted)). Instead, the court noted that the evidence on which petitioner principally relied in attempting to show an abuse of discretion by EPA consisted of "material which was never presented to the district court and which constitutes no proper part of the record on appeal" (*ibid.*). The court accordingly concluded that "there is no principled way in which the district court, in the circumstances of this case, can be said to have abused its discretion" (*id.* at A7). The court added that petitioner was in no position to "sweep procedural niceties under the rug," since it waited almost three years from the time of the initiation of the state court action to seek Spittler's deposition; "[h]aving indulged in such lassitude, [petitioner] can scarcely be heard to complain that established procedure should be discarded in order that it might extricate itself from a self-constructed box" (*id.* at A7-A8).

2. Petitioner does not contend that the court of appeals applied an improper standard in judging petitioner's reconsideration motion under Fed. R. Civ. P. 59. Nor could it; it is settled law that a district court's denial of a

Rule 59(e) motion will be set aside only for abuse of discretion.[1] Similarly, petitioner does not contend that the court of appeals was incorrect in its resolution of the only question that it actually decided: whether the district court abused its discretion in denying the Rule 59(e) motion for reconsideration. And again, that ruling plainly was correct: as the court of appeals explained, petitioner's request for Spittler's testimony failed to conform to EPA requirements, and petitioner's submission to the district court offered no reason to believe that the agency had been arbitrary in its decision.[2]

Instead, petitioner contends (Pet. 9-12) in this Court, for the first time in this proceeding, that its motion for reconsideration should have been treated as a motion to amend the complaint under Fed. R. Civ. P. 15(a). In making this argument, petitioner relies on *Foman* v. *Davis*, 371 U.S. 178, 182 (1962), where the Court held that permission to amend a complaint pursuant to Rule 15(a) "should, as the rules require, be 'freely given.' " *Foman*, however, is inapposite here. In that case, the plaintiff had expressly sought to amend her complaint in the district court, and had argued the substance of her motion to amend on appeal (see 371 U.S. at 179-181). Here, in contrast, petitioner's motion simply sought reconsideration of the district court's initial decision (see Pet. App. A39-A41), and it was treated as a motion for reconsideration—not a motion to amend the complaint—by both courts below. Petitioner first raised the possibility of amending its com-

[1] See, e.g., *Thomas* v. *Farmville Mfg.*, 705 F.2d 1307 (11th Cir. 1983); *Huff* v. *Metropolitan Life Ins. Co.*, 675 F.2d 119 (6th Cir. 1982); *Weems* v. *McCloud*, 619 F.2d 1081 (5th Cir. 1980). See generally 6A *Moore's Federal Practice* § 59.15[4], at 59-336 (2d ed. 1987).

[2] Since the court below expressly did not reach the merits of petitioner's APA argument (see Pet. App. A6), there is no reason for this Court to consider petitioner's contentions on the merits (Pet. 12-18).

plaint in its petition for a writ of certiorari in this Court. There is no reason for this Court to address petitioner's argument now.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[1] In any event, the Court made it clear in *Foman* that motions to amend under Rule 15(a) may be denied when, for example, the movant has demonstrated "undue delay" (371 U.S. at 182). That is the case here, where the court of appeals noted petitioner's "lassitude" in its attempts to obtain Spittler's testimony (Pet. App. A7).

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60457